Supreme Court, U.S.
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No. 99-1907

IN THE

Supreme Court of the United States

BEHLES-GIDDENS, P.A., now known as
J.D. BEHLES & ASSOCIATES, P.C.,

Petitioner,

v.

ANGEL PROJECT I, LTD. and UNITED STATES TRUSTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT

The Petitioner, Behles-Giddens, disagrees with the Question Presented posed by the Solicitor General. The question is not whether the bankruptcy court erred in disallowing the requested fees as not "actual or necessary" within the meaning of Section 330(a). The primary question of the Petition concerns the plain meaning of Sections 328(a) and 330(a) read in tandem, and the impact that both statutes, not just Section 330(a), have on hourly fee arrangements approved by the bankruptcy court. Behles-Giddens seeks nothing more than to direct the Court's attention to the plain terms of Sections 328(a) and 330(a). Section 328(a) authorizes a committee appointed under section 1102 to employ counsel on any reasonable terms, including "on an hourly basis." *See Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (determining the definition of "claim" in 11 U.S.C. § 101(5) is a "straightforward issue of statutory construction to be resolved by reference to the 'text, history, and purpose' of the Bankruptcy Code"). When given a plain reading, Section 330(a)(1), by its own terms, is subject to the terms of Section 328.

Behles-Giddens was employed, with court approval, by the Property Owners Committee ("POC") on an hourly basis. The Sept. 30, 1993 Order on Motion to Employ Counsel specifically refers to "attorney's fees." Angel Fire Br. Opp'n App. 6. The attorney fees to which the bankruptcy court referred were evidenced in "Exhibit A" of Behles-Giddens' Amended Motion to Employ Counsel of Sept. 24, 1993. Angel Fire Br. Opp'n App. 1-4. The exhibit is entitled, "Behles-Giddens, P.A., Hourly Fee Schedule." Angel Fire Br. Opp'n App. 5. Behles-Giddens attorneys performed their work for the POC pursuant to the hourly fee schedule that: (1) was attached to its Amended Motion to Employ Counsel (Angel Fire Br. Opp'n App. 1-4), and that (2) the bankruptcy court used in rendering its decision to allow for Behles-Giddens' employment. Because Behles-Giddens' fees were based on the hourly fee schedule that the bankruptcy court used in its decision to approve the fee agreement, it is

Behles-Giddens' contention that the courts below failed to give any attention whatsoever to the role that Section 328(a) should have had in the awarding of its fees.

Behles-Giddens also disagrees with the argument by the Respondent Angel Fire that "cases under Section 328(a) involve special counsel employed for a specific purpose by the debtor or bankruptcy trustee, not . . . committee counsel." Angel Fire Br. Opp'n 3. This statement is incorrect. Neither the Bankruptcy Code nor the Report of the Senate Committee on the Judiciary on Section 328 (S. REP. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5825) suggest that Section 328(a) is inapplicable to the type of representation that Behles-Giddens undertook on behalf of the POC. In fact, the very terms of Section 328(a) specifically authorize the employment of committee counsel and a committee may do so on any reasonable terms, including on an hourly basis ("a committee appointed under section 1102 of this title . . . may employ . . . a professional person under section . . . 1103 . . . on any reasonable terms . . . including . . . on an hourly basis, . . ."). If Congress had intended that Section 328(a) apply only to special counsel or to contingent fee arrangements, and not to debtor counsel or committee counsel, it would have said so.

FURTHER REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN ORDER TO WHICH SECTION 328(a) APPLIES.

The Petitioner concedes, as the Solicitor General and Angel Fire suggest in their respective Briefs in Opposition, that attorney fee issues often involve fact-intensive determinations and are context-specific. But the few facts necessary in this case are clear. Behles-Giddens' Amended Motion to Employ Counsel (Angel Fire Br. Opp'n App. 1-4) and the attached Exhibit "A" (Angel Fire Br. Opp'n App. 5) specifically referred to Behles-Giddens' "hourly fees." The Sept. 30, 1993, Order on Motion

to Employ Counsel (Angel Fire Br. Opp'n App. 6) specifically allowed the debtor estate to pay "seventy-five (75%) of all attorney's fees." Both Respondents argue that the failure of the Order to specifically mention "Section 328(a)" or "on an hourly basis" is fatal to Behles-Giddens' case and, as such, Section 328(a) does not apply. This argument is incorrect. Neither the Bankruptcy Code nor the legislative intent, as evidenced by the Notes of the Senate Committee on the Judiciary for Section 328 (S. REP. No. 95-989, *supra*, 1978 U.S.C.C.A.N. at 5825), nor the pleading rules of the Rules of Bankruptcy Procedure (Rules 7008 and 9014), require that an employment order include the words "on an hourly basis" or "subject to Section 328(a)."

In the absence of any such requirements, Section 328(a) *does* apply to Behles-Giddens' court-approved, hourly fee arrangement. The conditions of Behles-Giddens employment were approved as required by Section 328(a), which provides for the employment, with the court's approval, of a professional person under Sections 327 and 1103 on any reasonable terms, including on a retainer, *hourly*, or on a contingent fee basis. Notwithstanding the employment order, if the terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions, the court can reduce or increase the fees to compensate for those unanticipated events. Nothing, however, happened later in the instant case that would cause the court to reduce Behles-Giddens' fees. Accordingly, based on a plain reading of Sections 328(a) and 330(a), Behles-Giddens asks this Court to uphold the terms of the Amended Motion to Employ Counsel and the Order thereon.

II. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE TANDEM USE OF SECTIONS 328(a) AND 330(a).

Behles-Giddens reiterates that there are different holdings among the circuits and bankruptcy courts (Pet. 9-10) concerning

the tandem application of Sections 328(a) and 330(a) — and more specifically what role, if any, Section 328(a) has in the bankruptcy court's decision to award attorney fees. The Solicitor General cites to *Zolfo, Copper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253, 261 (3d Cir. 1995), for the proposition that where a bankruptcy court's order does not expressly and unambiguously state specific terms and conditions pursuant to the first sentence of Section 328(a), the court is free to apply Section 330(a) "unfettered by the strictures of the second sentence Section 328(a)." U.S. Trustee Br. Opp'n 6. The Fifth Circuit, in *In re National Gypsum,* held that "[I]f prior approval is given to certain compensation, § 328 controls and the court starts with that approved compensation, modifying it only for developments unforeseen when originally approved." *In re National Gypsum Co.*, 123 F.3d 861, 862 (5th Cir. 1997). Similarly, the Ninth Circuit, in *In re Reimers*, held that the bankruptcy court improperly assumed that Section 330 gave the court the power to make a general reasonableness review, despite the express language of Section 328. The Ninth Circuit remanded and required the bankruptcy court below to award compensation to the special counsel applicant consistent with the terms of the contingent fee agreement. *In re Reimers*, 972 F.2d 1127, 1129 (9th Cir. 1992). To extent that the Third Circuit requires "express and unambiguous terms," and that the Fifth Circuit requires mere "prior approval to certain compensation," there *is* a conflict between at least these two circuits concerning the specificity by which a bankruptcy court must enumerate the terms of an employment order. Behles-Giddens contends, *supra*, that neither Section 328(a) nor any other provision of the Bankruptcy Code or the Rules of Bankruptcy Procedure require that an employment order specifically state the terms and conditions, such as "on an hourly basis" or "subject to Section 328(a)." In light of the differing views among the Third, Fifth, and Ninth Circuit Courts of Appeals concerning the specificity of an employment order, Behles-Giddens respectfully asks this Court to clarify just what it is that a bankruptcy court must state when Section 328(a) is involved.

CONCLUSION

The Petitioner respectfully asks the Court to determine how a plain reading of Sections 328(a) and 330(a) should have affected Behles-Giddens' court-approved, hourly fee arrangement. Given a tandem reading of Sections 328(a) and 330(a), Behles-Giddens is, quite frankly, perplexed as to how the courts below can ignore Section 328(a) and construe these fee statutes any other way.

Behles-Giddens respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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